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No. 04-597

IN THE

Supreme Court of the United States

UNITHERM FOOD SYSTEMS, INC.,

Petitioner,

v.

SWIFT ECKRICH, INC.
d/b/a CONAGRA REFRIGERATED FOODS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's Rule 29.6 Statement was set forth at page ii of Petitioner's Opening Brief, and there are no amendments to that Statement.

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ARGUMENT

I. ConAgra's Arguments Are Largely Irrelevant To The Question On Certiorari.

Much of ConAgra's repetitious Response Brief is not pertinent to the question on certiorari. ConAgra's Response Brief contains the same spin on the facts as its previous appellate papers, but side-steps the hard realities posed by the question at issue. There is no antitrust standing or antitrust injury issue here.[1] The trial court and the Federal Circuit concluded that the Unitherm Process and the patented process are one and the same. (Pet. App. 20a). "In short, Unitherm's undisputed evidence proved that its own process included each and every limitation of every claim of the '027 Patent." (Pet. App. 25a-26a). Unitherm and ConAgra were undisputedly direct competitors for sale of the process.[2] Furthermore, this Court denied ConAgra's Conditional Cross-Petition for a Writ of Certiorari regarding antitrust standing. 125 S. Ct. 1399 (2005).

ConAgra's Response Brief seeks to re-try the case the jury decided against it. ConAgra continues to quote selectively, and out of context, Dr. Mangum's testimony describing the relevant market. (Br. for Resp't p. 6). Unitherm long ago showed this to

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[1] ConAgra's Answer (Docket No.9) and Amended Answer did not contain any reference to Unitherm having a lack of standing or antitrust injury, as affirmative defenses. (R. A0268-0286). In the final Pretrial Order, ConAgra did not contend that Unitherm lacked standing or had not suffered antitrust injury. (R. A2886-2893). In its trial brief, ConAgra never mentioned that Unitherm lacked standing or antitrust injury. (R. A3092-3096).

[2] ConAgra's expert, Dr. Goedde, testified:

> Q. . . . So what is being licensed here, as I think we've made I hope clear by now, is nothing but the process that Unitherm was selling and that ConAgra was selling; right?
>
> A. Yes.

(R. A5844).

be misleading. (Br. for Pls./Appellees to Fed. Cir. pp. 34-36). ConAgra continues to suggest that the claimed color "golden brown" should have exempted it from the fraud it perpetrated on the Patent Office. (Br. for Resp't pp. 1, 4-6 n.5).[3] Similarly, ConAgra's discussion of its irrelevant post-trial motion for remittitur has nothing to do with the question on certiorari.[4]

The essence of ConAgra's argument is to blame the trial court instead of recognizing that it is counsel's job to follow the rules. The fact that ConAgra never made any motion for judgment as a matter of law at trial on any of the factual issues

[3] ConAgra's "defense" to fraudulently obtaining a patent on the Unitherm Process was to concoct a special definition for the claim term "golden brown" by combining Hunter-LAB meter readings from the patent examples and then adding them to the patent claims. ConAgra contended that this special definition of "golden brown" is so narrow and precise that photographs cannot capture it and the human mind is incapable of remembering or even recognizing it. (*See* Confidential Br. of Appellant, Swift-Eckrich to Fed. Cir. pp.12, 31-32). The district court, the jury, and the Federal Circuit all concluded that ConAgra's redefinition of "golden brown" was meritless.

Further, ConAgra's assertions (Br. for Resp't p. 10) that the Unitherm Process is nothing more than the inferior "conventional" process mentioned in the patent and that the Unitherm/patented process differs from the conventional process only with regard to the production of better color are equally meritless. (*See* Br. for Pls-Appellees Unitherm and Jennie-O to Fed. Cir. pp. 3-11, 14-21, 40-42, 44-45, and 54-57; Resp. of Pls-Appellees Jennie-O and Unitherm to Def.-Appellant's Combined Pet. for Panel Reh'g and Suggestion for Reh'g En Banc pp. 2-15).

[4] ConAgra misleadingly describes this as "E. ConAgra's Post-Trial Motion For A New Trial." (Br. for Resp't p. 11). ConAgra's Motion was entitled: "Defendant Swift-Eckrich's Motion for Remittitur Reducing Damage Award on Antitrust Count, or, in the Alternative, for New Trial on Antitrust Damages." (J.A. 34a). In ConAgra's Brief, this becomes inverted as ". . . ConAgra *did* move for a new trial under Rule 59, or in the alternative for a remittitur." (Br. for Resp't p. 11; emphasis in original).

it raised for the first time on appeal is made manifest in its footnote 6. In reference to ConAgra's motion for directed verdict at the close of all the evidence when the trial court asked, "Is it on the same basis *you argued earlier*?" (J.A. 22a; emphasis added), ConAgra states in footnote 6 that,

> Since the court had not allowed enough time for *any argument* on the antitrust and intentional interference claims during the trial, this had to be a reference to the pre-trial brief and other pre-trial papers, not the argument of ConAgra's motions at the close of Unitherm's case in chief.

(Br. for Resp't p. 10; emphasis added).

This statement is remarkable for more than one reason. ConAgra solemnly contends that the trial court did not mean the five pages of argument it listened to when ConAgra made its earlier motion for directed verdict at the close of Unitherm's case, but rather the papers ConAgra had filed before the trial began. This contention is utterly preposterous. Further, it is a stark concession of what the record so clearly reveals - that ConAgra never made any Rule 50(a) argument on Unitherm's antitrust claim.[5]

With regard to ConAgra's contention that the trial court "had not allowed enough time for any argument", the record shows that the trial court allowed ConAgra's counsel to argue at length in making his motion for directed verdict at the close of Unitherm's case, and in no way prevented counsel from urging

[5] While the question on certiorari assumes that a Rule 50(a) motion was made, the obvious absence of such a motion is somewhat akin to ignoring the elephant in the room.

A cardinal principle of Rule 50 is to give the non-moving party an opportunity to cure any perceived evidentiary defect. "Relatedly, a party who has rested may move to reopen her case in order to cure an evidentiary deficiency identified in a Rule 50(a) motion." *Teneyck v. Omni Shoreham Hotel*, 365 F.3d 1139, 1149 (D.C. Cir. 2004).

any argument he wanted to make. (J.A. 15a-22a).[6] If, when Unitherm rested its case, ConAgra truly thought Unitherm's proof on its antitrust claim was so wanting in evidence as to be "plain error" ConAgra would have said so. In truth, ConAgra did not think Unitherm's antitrust evidence was insufficient. ConAgra did not decide to make that argument until it arrived at the Federal Circuit, thereby severely prejudicing Unitherm's ability to address the arguments. As has been shown in Unitherm's previous appellate papers,[7] and as will be further shown below (Part VII), as a result of not having the entire record before it, the Federal Circuit's foray through the truncated Joint Appendix led it into grave factual errors.

II. ConAgra's Argument That The Trial Court, And Unitherm, Should Have Divined What ConAgra Allegedly Intended, Because Of A Motion For Summary Judgment And Trial Brief, Is Meritless.

ConAgra's argument that it should be absolved from compliance with Rule 50 because of the "futility" of making such a motion, amounts to this: the points were urged in a motion for summary judgment and a trial brief so the trial court should have known what ConAgra meant to say, even though ConAgra never uttered a word about such insufficient evidence at trial or post-judgment. ConAgra's argument cannot survive even

[6] It is quite misleading, and unfair to the trial court, for ConAgra to state: "The court then allowed 'five minutes or less' for argument. . . ." (Br. for Resp't p. 9). A cursory review of the record shows that ConAgra argued at length with no limitation by the court. (J.A. 15a-22a).

Furthermore, if counsel thinks the trial court is not allowing adequate time for argument on his pre-verdict Rule 50(a) motion, the law in the Tenth Circuit requires that he make an objection to that effect. *Townsend v. Daniel, Mann, Johnson & Mendenhall*, 196 F.3d 1140, 1148 (10th Cir. 1999).

[7] *See* Combined Pet. for Panel Reh'g and Reh'g En Banc, submitted by Pls-Appellees pp. 9, *et seq.* (J.A._121a); Br. for Pet'r pp. 34-38.

minimal scrutiny. In the first place, the only argument in ConAgra's Motion for Summary Judgment directed to Unitherm's antitrust claim was that "Unitherm cannot succeed on its antitrust claims against Swift-Eckrich because it is not a competitor of Swift-Eckrich." (R. A0248). In short, ConAgra made a standing argument. There was no hint of an insufficiency of evidence argument. ConAgra's Summary Judgment Reply Brief complained that Unitherm had improperly redefined the relevant market. (Docket No. 172, Def's Reply Br. Mot. for Summ. J. pp. 1-3). The insufficiency arguments made by ConAgra in the Federal Circuit are simply absent from its Motion for Summary Judgment.

Furthermore, ConAgra's Motion for Summary Judgment was filed more than a year before the trial, and the trial court entered its Order ruling on the Motion more than half a year before trial.[8] Even if ConAgra had raised the insufficiency arguments in its summary judgment motion that it first raised on appeal, it defies belief to think a busy trial court could remember such details many months later. Also, numerous depositions were taken after ConAgra's Motion for Summary Judgment was ruled on.[9] And there were eight days of trial generating over 1,500 pages of transcript as well as numerous and voluminous exhibits introduced into evidence. In addition, it has long been settled that denial of summary judgment is not reviewable on appeal. "It is strictly a pretrial order that decides only one thing - that the case should go to trial." *Switzerland Cheese Ass'n. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); *see also Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1251 (10th

[8] Docket No. 117 (Mot. for Summ. J. by Def. Swift-Eckrich, Inc., filed February 11, 2002); Docket No. 194 (Order, filed August 19, 2002); Docket No. 277 (Court Minute, Jury trial commences March 10, 2003).

[9] Docket No. 197 (Joint Discovery Plan, filed August 30, 2002, listing depositions yet to be taken).

Cir. 1992); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 and n.14 (Fed. Cir.), *cert. dismissed*, 479 U.S. 1072 (1987).[10]

Presumably it is merely carelessness that caused ConAgra to repeat in its Response Brief the same misrepresentation it made to the Federal Circuit in its Reply Brief (when Unitherm had no opportunity to respond) that, "**On the first day of trial**, the court indicated that argument on JMOL motions would be very restricted. . . ." (Br. for Resp't p. 41; emphasis added).[11] But in fact, the statement by the trial court to which ConAgra refers occurred at the close of the trial day on Friday, March 14, 2003. (Tr. 925; R. A4699-4700). The trial began on Monday, March 10. (Tr. 3). The trial court had heard five days of testimony from over a dozen witnesses and received into evidence more than 100 exhibits.[12] The trial court's statement that, "I'll certainly allow everybody to argue if I think you're going to prevail, and I can almost anticipate what your arguments are going to be at this point" (R. A4700), indicates an openness to any argument based on the evidence, rather than the reverse as ConAgra suggests.[13] Twisting the facts does not change the truth: ConAgra

[10] In *Myers v. Mo. Pac. R.R. Co.*, 52 P.3d 1014, 1034 (Okla. 2002), the Oklahoma Supreme Court stated:

> Furthermore, it would be anachronistic after a case has been tried on the merits to review that case on pretrial submissions alone rather than upon the evidence and record as a whole. . . . At least ten Federal Circuit courts have held that the denial of a summary judgment motion is not reviewable on appeal.

[11] *See* Reply Br. of Appellant to Fed. Cir. p. 26.

[12] Docket No. 287 (Courtroom minutes . . . master exhibit list attached).

[13] In *Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634 (2d Cir. 1995), defendant contended that pre-verdict rulings and comments by the trial court excused defendant's failure to file a Rule 50(b) motion. The Second (Cont'd)

never made a proper Rule 50 motion at any stage of the proceedings.

Even weaker than its contention that the trial court had some mental telepathy about the summary judgment motion, is ConAgra's argument that its trial brief satisfied Rule 50. Both Unitherm and ConAgra filed trial briefs on March 3, 2003, the Monday before trial began.[14] At the time the trial briefs were filed, the trial court was confronted with numerous pending motions in limine.[15] The trial court did not get all its written rulings on the motions in limine filed until the third day of trial.[16] The record is silent as to whether the trial court ever had time to review any party's trial brief, but for sure a trial brief does not invoke a ruling by the trial court. ConAgra never made reference to the brief during argument or post-verdict. What ConAgra might have secretly intended cannot avail it here.[17] Even if the

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Circuit held that the failure to file a Rule 50(b) motion was fatal to an appeal claiming insufficiency of the evidence:

> To preserve for appeal a challenge to the denial of a pre-verdict motion for judgment as a matter of law, a movant must renew that motion after the verdict. Fed.R.Civ.P. 50(b); *see Johnson v. New York, New Haven & Hartford R.R.*, 344 U.S. 48, 50 (1952); *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 214-18 (1947).

Id. at 638.

[14] Docket Nos. 263 and 267.

[15] Docket Nos. 242, 243, 244, 245, 246, 247, 255, 257, 272, 273, 274.

[16] Docket Nos. 276 (March 10, 2003), 279 (March 12, 2003), 280 (March 12, 2003).

[17] Regarding respondent's unspoken intentions in *Johnson v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 48, 51 (1952), this Court stated:

(Cont'd)

trial court had reviewed ConAgra's trial brief, ConAgra's failure to allude to its contents at trial or post-verdict would logically lead the trial court to assume ConAgra had abandoned any such arguments in the face of the evidence at trial. Further, the proposition urged by ConAgra that a Rule 50 motion is not required at trial if issues have been discussed in pre-trial memoranda, cannot be squared with the language of Rule 50(a)(1) that: "If *during a trial by jury* a party has been fully heard on an issue. . . ."

There is another glaring inconsistency in ConAgra's argument: by failing to file a renewed motion for JMOL under Rule 50(b), ConAgra was foregoing entitlement to *judgment* under controlling Supreme Court precedent *in every circuit* including the Tenth Circuit. ConAgra could never get the relief it sought in the Federal Circuit - judgment in its favor - only the relief it did not seek - a new trial on Unitherm's antitrust claim. This turns the outcome on its head, because ConAgra did not want a new trial on the merits, it wanted *judgment*. In short, ConAgra's pretense of relying on Tenth Circuit law in failing to file a post-judgment motion for JMOL is belied by the relief it sought in the Federal Circuit - *i.e.*, judgment, not a new trial.[18]

(Cont'd)

> The defect in this argument is that respondent's motions cannot be measured by its unexpressed intention or wants. . . . And surely petitioner is not to have her opportunity to remedy any shortcomings in her case jeopardized by a failure to fathom the unspoken hopes of respondent's counsel.

[18] Of course, any effort by ConAgra to assert post-judgment arguments it did not urge in its pre-verdict motion would have been impermissible. As the Federal Circuit stated in *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1107 (Fed. Cir. 2003): "In view of a litigant's Seventh Amendment rights, it would be constitutionally impermissible for the district court to re-examine the jury's verdict and to enter JMOL on grounds not raised in the pre-verdict JMOL."

III. The Deadline For Submitting A Rule 50(b) Motion Is 10 Days After Entry Of Judgment, Not After Merely Receiving A Verdict.

ConAgra attempts to muddy the water by citing cases holding "that the district court can grant a Rule 50(a)(2) motion *post-verdict* without a renewal under Rule 50(b)." (Br. for Resp't p. 22 and n.14; emphasis in brief). The district court can do this. But the cases ConAgra cites are not pertinent to the issue at hand. In each of the cases cited by ConAgra *no judgment had been entered*.[19] Rule 50(b) sets a *deadline* for renewing a motion for JMOL "no later than 10 days after entry of judgment." The movant does not *have* to wait until entry of judgment to renew his motion for JMOL. He can renew it immediately after the jury returns its verdict. If he does so, the trial court can rule on it immediately or set it for hearing. Similarly, if the trial court rules on a reserved motion for JMOL made pre-verdict following the jury verdict but before judgment is entered, its ruling is effectively a Rule 50(b) ruling. In *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850 (Fed. Cir. 1991), the Federal Circuit noted (in *dicta*) that if the trial court ruled post-verdict on a deferred pre-verdict motion, it "effectively converts the motion into a post-verdict motion." *Id.* at 861.

In *Warkentien v. Vondracek*, 633 F.2d 1 (6th Cir. 1980), the defendant moved for directed verdict at the conclusion of the evidence and the trial court reserved decision on the motion. The jury returned a verdict in favor of plaintiff, and defendant orally renewed its motion when the jury was dismissed. The trial court set the reserved motion for hearing and briefing. Following the hearing, the trial court granted the renewed

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[19] *Norton v. Snapper Power Equip.*, 806 F.2d 1545 (11th Cir. 1987); *Shaw v. Edward Hines Lumber Co.*, 249 F.2d 434 (7th Cir. 1957); *First Safe Deposit Nat'l Bank v. Western Union Tel. Co.*, 337 F.2d 743 (1st Cir. 1964); *Nichols Constr. Corp. v. Cessna Aircraft Co.*, 808 F.2d 340 (5th Cir. 1985); *Mosser v. Fruehauf Corp.*, 940 F.2d 77 (4th Cir. 1991). (Br. for Resp't p. 22 n.14).

motion. Praising the quality of the trial court's opinion ruling on the motion,[20] the Sixth Circuit affirmed, concluding that *Johnson's* requirement for a renewed motion under Rule 50(b) was satisfied by defendant's oral renewal of the motion after the jury was dismissed.

If, as in each of the cases cited by ConAgra, the district court grants a reserved Rule 50(a) motion when the jury returns its verdict but before entry of judgment, it has acted in accordance with its power.[21] But if the trial court *denies* a reserved motion after verdict but before judgment is entered, the movant must renew the motion per Rule 50(b). Once *judgment* is entered - the district court having denied the Rule 50(a) motion pre-verdict or post-verdict, or having declined to rule on a reserved motion before entry of judgment - the *only*

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[20] "Judge Miles' effort is a superlative example of such an opinion, and we have borrowed heavily from it in portions of this opinion." *Id.* at 2 n.2.

[21] In the cases of *Norton*, *Shaw*, *First Safe*, *Nichols*, and *Mosser*, each trial court ruled on the reserved 50(a) motion either immediately or very shortly after the jury returned a verdict for plaintiff. This practice appears to be in harmony with the recommendation by the 1991 Advisory Committee Notes (Subdivision (b), second paragraph):

> Often it appears to the court or to the moving party that a motion for judgment as a matter of law made at the close of the evidence should be reserved for a post-verdict decision. This is so because the jury verdict for the moving party moots the issue and because a pre-verdict ruling gambles that a reversal may result in a new trial that might have been avoided. For these reasons, the court may often wisely decline to rule on a motion for judgment as a matter of law made at the close of the evidence, and it is not inappropriate for the moving party to suggest such a postponement of the ruling until after the verdict has been rendered.

way the verdict loser can preserve sufficiency of the evidence for appellate review is to file a Rule 50(b) motion.[22]

This construction harmonizes with the language of Rule 50 and with the application of other pertinent Rules. A Rule 50(a)(2) motion "may be *made* at any time before submission of the case to the jury." Under Rule 50(b), the motion is renewed "by *filing* a motion no later than 10 days after entry of judgment." Federal Rule of Civil Procedure 7(b)(1) requires that a motion be *in writing* "unless made during a hearing or trial." When judgment is entered, the trial is over. A Rule 50(b) motion must be in writing, filed and served. The Advisory Committee Notes to the 1991 Amendments state (last paragraph of subdivision (b)):

> [Rule 50(b)] retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment. The renewed motion *must be served and filed* as provided by Rule 5. A purpose of this requirement is to meet the requirements of F.R.App. P. 4(a)(4).[23]

(Emphasis added).

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[22] Here, the jury verdict was filed March 19, 2003. (J.A. 23a-26a). The judgment was filed eight days later, on March 27, 2003. (J.A. 27a-30a). The Advisory Committee Notes to the 1995 Amendments provide:

> The phrase 'no later than' is used - rather than 'within' - to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk. It should be noted that under Rule 6(a) Saturdays, Sundays, and legal holidays are excluded in measuring the 10-day period, and that under Rule 5 the motions when filed are to contain a certificate of service on other parties.

[23] Federal Rule of Appellate Procedure 4(a)(4) provides in pertinent part:

(Cont'd)

IV. The Trial Court Did Not, And Could Not, Commit Error By Denying ConAgra's Pre-Verdict Motion For JMOL, And Therefore There Can Be No Plain Error.

As Unitherm discussed in its Brief for Petitioner (pp. 25-26, and *see* n.21, *supra*), it has long been recognized that trial courts are encouraged to submit the case to the jury even if the judge believes the evidence to be insufficient. That being so, a trial court's denial of a pre-verdict motion for JMOL cannot be error.[24] And as stated in *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321 (1967):

> Under Rule 50(b), if a party moves for a directed verdict at the close of the evidence and if the trial judge elects to send the case to the jury, the judge is 'deemed' to have reserved decision on the motion.

Therefore, as a matter of law, the trial court makes its pre-verdict ruling subject "to the court's later deciding the legal questions raised by the motion." Thus, the trial court's pre-verdict ruling is interlocutory and cannot be error. It follows that if the pre-verdict ruling cannot be error, it assuredly cannot be *plain* error. The only way the movant can preserve the issue of sufficiency

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> If a party timely *files* in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> (i) for judgment under Rule 50(b);
>
> . . . .
>
> (v) for a new trial under Rule 59;
>
> . . . .

(Emphasis added).

[24] The Court stated in *Johnson*: "The rule itself made the reservation automatic." 344 U.S. at 53.

of the evidence for appellate review is by filing a Rule 50(b) motion no later than 10 days after entry of judgment.

V. ConAgra Seeks To Have This Court Set Aside Long-Established Precedent.

The requirement for filing a Rule 50(b) motion to preserve sufficiency of the evidence for appellate review was summarized by this Court in *Johnson*:

> This *requirement* of a timely application for judgment after a verdict is not an idle motion. . . . The *requirement* for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness. . . . Rule 50(b) as written and as construed by us is not difficult to understand or to observe.

344 U.S. at 53 (emphasis added).

This Court's language in *Johnson* was essentially a reiteration of its language in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947):

> Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. [Citations omitted.] Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone.

As Unitherm has previously pointed out, *Johnson* and *Cone* do not expressly govern the issue at hand because in those cases the respondent filed a motion for new trial or to set aside the verdict, while no such motion was filed herein. Nevertheless, it

is not possible to reconcile the foregoing language in *Johnson* and *Cone* with ConAgra's argument that no post-judgment Rule 50(b) motion need be filed to preserve sufficiency of the evidence for appellate review.[25] Thus, what ConAgra seeks, albeit indirectly, is the overruling of long-standing precedent. Such a reversal would open the door to confusion and the balkanization of the controlling law nationwide. This should not happen.

VI. The Court Should Apply Its Interpretation Of Rule 50(b) To This Case.

While ConAgra tips its hat to this Court's most recent pronouncement of its retroactivity jurisprudence in *Harper v. Virginia Dep't. of Taxation*, 509 U.S. 86 (1993), ConAgra then goes on to conduct its own analysis loosely attempting to follow *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).[26] "But whatever the continuing validity of *Chevron Oil* after *Harper* . . . and *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995)," this is not a case for purely prospective application of a "new rule." *See Ryder v. United States*, 515 U.S. 177, 184-185 (1995).

As this Court found in *Harper*:

> "[B]oth the common law and our own decisions" have "recognized a general rule of retrospective effect for the constitutional decisions of this Court." *Robinson v. Neil*, 409 U.S. 505, 507 (1973). Nothing in the Constitution alters the fundamental rule of

[25] "As a practical matter, moving parties must renew the motion for judgment post-verdict to preserve the right to full appellate review of the trial court's denial of a pre-verdict motion for judgment (*see* § 50.91[1])." 9 MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE, § 50.41 (3d ed. 2005).

[26] ConAgra's footnote 21 incorrectly states that there were five opinions in *Harper*. There were four. Also, only five justices joined Part II of the majority's opinion, not eight. Seven justices concurred in the judgment and Parts I and III of the majority opinion.

> "retrospective operation" that has governed "[j]udicial decisions . . . for near a thousand years." *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910) (Holmes, J., dissenting).

509 U.S. at 94. The Court further stated:

> Regardless of how *Chevron Oil* is characterized, our decision today makes it clear that "the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case" and that the federal law applicable to a particular case does not turn on "whether [litigants] actually relied on [an] old rule [or] how they would suffer from retroactive application" of a new one. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991) (opinion of Souter, J.).

Id. at 95 n. 9. The Court in *Harper* was addressing the viability of "selective prospectivity," but these statements by the majority of the Court are inconsistent with ConAgra's plea for pure prospective application in this case.

Even under a *Chevron Oil* analysis ConAgra's arguments fail, because a decision in Unitherm's favor would not "overrul[e] clear past precedent on which litigants may have relied" or "decid[e] an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106-07. As Unitherm has previously shown, the outcome of this case should be governed by existing Supreme Court authority. In addition, the Tenth Circuit had already identified a split in the circuits on this issue. *See Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1246-47 n.34 (10th Cir. 1999); *see also Reynoldsville Casket Co.*, 514 U.S. at 763 (opinion of Kennedy, J., concurring in judgment); *Harper*, 509 U.S. at 110-112 (opinion of Kennedy, J., concurring in judgment). Given this Court's precedents and the clear circuit split, a decision of this Court affirming the majority of circuit

courts has been "clearly foreshadowed." If ConAgra's view is adopted, no resolution of a circuit split in a civil case could ever be applied retroactively.[27]

VII. An Appellate Court Should Not Review For Sufficiency Of The Evidence In The First Instance Because It Is Too Far Removed From The Trial.

It is difficult for an appellate court, far removed in place and time, to know what actually went on at trial. It shows respect to trial courts for appellate courts to require that they be accorded the opportunity in the first instance to speak to the issue of sufficiency of the evidence.

This case compellingly demonstrates the critical importance of requiring that the trial court pass in the first instance on a post-judgment motion for JMOL asserting insufficiency of the evidence. Without having the entire record in front of it for review, the Federal Circuit conjured up perceived evidentiary deficiencies that did not exist. ConAgra had not raised the issues at trial or post-verdict, so the evidence of record was not contained in the Joint Appendix filed in the Federal Circuit. For example, in discussing the important "first element" of Unitherm's *Walker Process* claim, the Federal Circuit incorrectly stated:

> Though the plaintiffs' [sic] have provided no direct evidence proving that either Singh or ConAgra actually made this representation [*i.e.*,that Prem Singh invented the claimed process], we may nevertheless presume that Singh, the named inventor and applicant, must have reviewed the specification

[27] The Court should reject ConAgra's suggestion that it act in a more "legislative" posture because the case involves a Federal Rule. As this Court is well aware, its role in promulgating the Federal Rules is spelled out clearly by the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, wherein Congress specifically reserved a role for itself.

> and signed the required declaration before the application was filed.

(Pet. App. 35a).[28] In fact, Prem Singh's signed Declaration of Inventorship was introduced into evidence by Unitherm *through its very first witness.*[29] (Plaintiffs' Exhibit 2, pp. 2, 3; Tr. 98-102). The Federal Circuit went on to "review the sufficiency of the economic evidence that Unitherm proffered in support of its antitrust claim." (Pet. App. 46a). The Federal Circuit concluded, quite incorrectly, that:

> Nothing in the record addresses whether potential customers of the patented process faced with a price increase would shift to other processes offering different combinations of benefits. *Id.* [sic]. This determination, however, lies at the heart of market definition in antitrust analysis.

[28] In its footnote 6, the Federal Circuit erroneously stated that because of perceived deficiencies in the evidence, "the plaintiffs must build an entirely circumstantial case using inferences and presumptions." (Pet. App. 35a, n. 6).

[29] Unitherm's first witness, Charles Van Horn, a lawyer in Washington, D.C., spent thirty years in the United States PTO, concluding his service as Deputy Assistant Commissioner for Patent Policy. (Plaintiffs' Exhibit 305-A; Tr. 82). For discussion of Mr. Singh's Declaration of Inventorship, see Tr. 98-102. ConAgra also inadvertently misrepresented this matter to the Federal Circuit in its Petition for Rehearing, *viz*: "The jury did not have Mr. Singh's oath (nor any part of the prosecution history) before it. . . ." (Appellant's Combined Pet. for Reh'g and Suggestion for Reh'g En Banc p. 13).

Throughout the trial ConAgra contended that its patented process for producing "golden brown" turkey breasts distinguished its process from Unitherm's. The Federal Circuit might have found it of interest to know that Unitherm had a refrigerated cooler in the courtroom during trial that was filled with "golden brown" turkey breasts produced by various vendors. The jury reviewed the turkey breasts at various times during the trial. (*See, e.g.*, Tr. 240, 304, 407).

(Pet. App. 47a). In fact, Plaintiffs' Exhibit 73 is a detailed six-page *economic analysis* of the benefits of the Unitherm system prepared for Bob Wood, Senior Vice-President of Operations of Jennie-O (Tr. 333), by Jeff Dierenfeld, the manufacturing engineer at Jennie-O. (Tr. 284). In considering shifting from the standard batch oven process to the Unitherm Process, Bob Wood had asked for "*economic justifications*" for Jennie-O's proposed expenditure of approximately $700,000 to acquire the Unitherm Process. (Tr. 347-351). Touting the "much more efficient system", Dierenfeld stated, "I am estimating total annual savings at $2,372,325. This is a conservative number based on $1.42 breast meat."[30] (Plaintiffs' Exhibit 73). Whether the Federal Circuit would have considered this evidence to be sufficient on the issue is unknowable, but it should at least have had this proof before it in assessing sufficiency of the evidence.[31]

With regard to the question on certiorari, it is unnecessary to extend the discussion of other factual errors by the Federal Circuit. The actual proof of record illustrates the importance, for principled appellate review, of having the trial court conduct

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[30] Of course, it seems only intuitive that food processors would not make capital expenditures of $700,000-$800,000 if the economic benefits did not justify them.

[31] The Federal Circuit's parenthetical comment ". . . , *or at least the relevant excerpts in the appellate record*," indicates its own awareness of its inability to review the entire record. (Pet. App. 46a; emphasis added). The Federal Circuit did not have the testimony of ConAgra's vice president of research and development (Chris Salm) about ConAgra's consideration of costs in converting to the patented process. (Tr.1128). In terms of injury to competition, the Federal Circuit did not have the testimony of ConAgra's engineering expert, Bobby Clary:

> Q. Were you advised by Stein [an oven manufacturing competitor of Unitherm's] that it had a dramatic sales loss because of the patent that's at issue in this case?
>
> A. Yes.

(Tr. 1294).

post-verdict analysis if the verdict loser is going to argue insufficiency of the evidence on appeal. Here, out of the trial transcript of 1,521 pages, *not* including depositions read at trial, only 456 pages were reproduced in the Joint Appendix. The Federal Circuit was not aware that these educated jurors (4 of the 8 jurors had Masters Degrees and one had a Ph.D. (R. A3125-30)) were permitted to take notes during trial (Tr. 118), and did so with great care. After receiving the final verdict in open court on punitive damages, the trial court addressed the jury:

> You have worked very hard taking more notes than any jury I've ever seen, worked hard and long into the night, and you have provided an answer to this dispute which couldn't have been answered without you.

(Tr. 1519). The Federal Circuit also did not know that the jury conducted interim deliberations during trial. (Tr. 43, 119-20). Or that Unitherm's damages expert, Jeff Kinrich, used large demonstrative charts to describe Unitherm's damages to the jury. (Tr. 1049, 1052). In short, all the reasons articulated by the Federal Circuit in *Biodex* for requiring a post-verdict motion for JMOL to preserve issues of alleged insufficiency of the evidence for appellate review, are manifest here. This Court has long recognized that it is not the province of the courts to disregard the jury's factual findings. In reversing the judgment of the court of appeals and affirming the trial court's judgment, this Court stated in *Berry v. United States*, 312 U.S. 450, 453 (1941):

> But [Rule 50(b)] has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact - a jury being the constitutional tribunal provided for trying facts in courts of law.

CONCLUSION

Where an appellate court is at its weakest is in assessing the sufficiency of the evidence to support a jury verdict. The very nature of the task renders the trial court better suited to perform it. As this Court observed in *Cone*, requiring the verdict loser to renew a motion for JMOL under Rule 50(b) "calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." Such requirement is the jurisprudence of the "vast majority" of the circuit courts of appeal. Unitherm submits that such a requirement will always sharpen the issues and result in better informed and better reasoned appellate decisions.

Here, the trial court did not — indeed, could not — commit error by denying ConAgra's pre-verdict motion for directed verdict. It was incumbent upon ConAgra to renew such motion post-judgment setting forth with *specificity* "the law and the facts" on which it relied in order to preserve sufficiency of the evidence for appellate review. ConAgra's failure to do so waived appellate review of the issue. The trial court's judgment on the verdict of this conscientious and attentive jury should be affirmed.

Unitherm respectfully submits that the judgment of the Federal Circuit should be reversed and the judgment of the trial court affirmed.

Respectfully submitted,

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